

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
OCT - 9 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)

CC Docket No. 96-187

DOCKET FILE COPY ORIGINAL

COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.

David N. Porter
Vice President, Government Affairs
MFS COMMUNICATIONS COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709

Andrew D. Lipman
Tamar E. Haverty
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for MFS
COMMUNICATIONS COMPANY, INC.

Dated: October 9, 1996

No. of Copies rec'd
List A B C D E

0213

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)

CC Docket No. 96-187

**COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.**

Table of Contents

INTRODUCTION AND SUMMARY.....	1
I. THE COMMISSION SHOULD STRICTLY LIMIT LEC TARIFFS ELIGIBLE FOR FILING ON A STREAMLINED BASIS (NPRM Part IV, para. 16-18).....	2
II. THE COMMISSION SHOULD PRESUME SECTION 204(a)(3) 7/15 DAY FILINGS LAWFUL WITHOUT LIMITING CUSTOMER REMEDIES (NPRM Part III, para. 7-15).....	6
III. STREAMLINED ADMINISTRATION OF LEC TARIFFS.....	9
A. Electronic Filing Should Be Implemented for All Tariffs and All Carriers (NPRM Part V, para. 21).....	9
B. Timely Notice of Streamlined Tariff Filings to the Public and Interested Parties is in the Public Interest (NPRM Part V, para. 26 and 28).....	10
C. The Commission Should Strictly Apply the Rules it Adopts for Section 204(a)(3) Filings and Reject any Filing that Does Not Comply with Its Rules (NPRM Part V, para. 25).....	11
D. The Commission Should Not Abandon Pre-Effective Review of Section 204(a)(3) Streamlined Tariff Filings (NPRM Part V, para. 23).....	12
IV. CONCLUSION.....	13

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)

CC Docket No. 96-187

**COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.**

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking (released September 6, 1996) in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

MFS supports the Commission's efforts to implement, consistent with the express terms of section 402(b)(1)(A) of the 1996 Act,² section 204(a)(3) of the Communications Act. However, MFS urges the Commission not to go beyond the explicit language of section 204(a)(3) which provides streamlined 7 or 15 day notice periods only for LEC tariffs that contain rate decreases or increases. MFS asks the Commission to adopt an interpretation of "deemed lawful" which will presume a section 204(a)(3) tariff filing lawful without limiting a customer's remedies should the

¹*In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, FCC 96-367, CC Docket No. 96-187 (rel. Sept. 6, 1996) ("Notice" or "NPRM").

²Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act")

Commission later issue a finding of unlawfulness. MFS also urges the Commission to establish rules that provide the Commission, customers, and interested parties with a meaningful opportunity to review and challenge section 204(a)(3) filings.

Finally, MFS supports the Commission's proposal to require electronic filing of tariffs and urges the Commission to implement an electronic filing system that will ease the burdens the current system places on carriers, customers and the Commission and that will be more ecologically sound than the historically paper-oriented process.

I. THE COMMISSION SHOULD STRICTLY LIMIT LEC TARIFFS ELIGIBLE FOR FILING ON A STREAMLINED BASIS (NPRM Part IV, para. 16-18)

MFS urges the Commission to follow a strict reading of the statute when deciding which types of LEC tariff filings are eligible for 7/15 day filing under section 204(a)(3). In the NPRM, the Commission tentatively concludes that **all** LEC tariff filings involving changes to the rates, terms and conditions of **existing** service offerings are eligible for streamlined treatment.³ While MFS agrees that only tariff filings regarding existing service offerings should be eligible for streamlined treatment,⁴ MFS disagrees with what appears to be a conclusion that tariff filings involving changes

³Notice at para. 18.

⁴This interpretation necessarily excludes all tariffs that include any new service offerings, such as individual case basis ("ICB") tariff offerings. The Common Carrier Bureau recently restated its policy on ICB tariff offerings to emphasize that ICB offerings are an exception to the standard carrier practice of making a service generally available to all customers and that ICB rates apply to new services only. *Common Carrier Bureau Announces New Policy Regarding Issuance of Tariff Orders*, Public Notice (Sept. 29, 1995).

to terms, conditions or practices that do not include a rate increase or decrease are eligible for the 7/15 day notice period.

Under a strict reading of the express terms of section 204(a)(3), the 7/15 day notice period applies **only when the filing includes a rate reduction or increase**. Although there is scant legislative history regarding this section, Majority Leader Dole and the Conference Report briefly summarize the provision:

Regulatory relief. Speed up FCC action for phone companies by making **any revised charge that reduces rates** effective 7 days after it is filed with commission. **Rate increases** will be effective 15 days after submission. To block such changes, FCC must justify its actions.⁵

New subsection (b) of section 402 of the conference agreement addresses regulatory relief that **streamlines** the procedures for **revision** by local exchange carriers of charges, classifications and practices under section 204 of the Communications Act.⁶

Both summaries of section 204(a)(3) lend support to the Commission's interpretation that only revisions to existing service offerings are eligible for streamlined filing. Both summaries also support the following interpretation of section 204(a)(3):

- (1) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a **streamlined** basis; and
- (2) Any charge, classification, regulation or practice **that includes a reduction in rates** shall be effective 7 days after the date on which it is filed unless the Commission takes action to suspend it and any charge, classification, regulation or practice **that includes an increase in rates** shall be effective 15 days after the date on which it is filed unless the Commission takes action to suspend it.

⁵141 CONG. REC. S7898 (June 7, 1995) (emphasis added).

⁶H. Rep. No. 104-459, at 186 (1996) (emphasis added).

MFS believes that this reading of the statute is more consistent with both the actual text of the 1996 Act and legislative history than the interpretation proposed by the Commission. Under MFS' proposed interpretation, new section 204(a)(3) first directs the Commission to develop rules to streamline all LEC tariff filings that include revised charges, classifications, regulations, or practices, without specifying what constitutes "streamlining". Secondly, new section 204(a)(3) directs the Commission to implement a specific streamlining requirement for tariffs that include rate reductions and rate increases by making them effective on 7 or 15 days notice, respectively.

The Commission has previously adopted streamlined tariff rules that do not address notice periods. For instance, streamlined treatment for nondominant carriers includes an exemption from the detailed composition of tariff rules set forth at 47 C.F.R. § 61.54.⁷ The Commission can and should adopt streamlined procedures as directed by the 1996 Act for LEC tariff filings that include revised classifications, regulations or practices. However, until the Congressional goal of opening up competition in all telecommunications markets is met, which MFS suggests cannot happen until competitors serve at least one-third of the U.S. local service customers, the Commission should not go beyond the express terms of the Act which limit the 7/15 day notice periods to LEC tariff filings containing rate decreases or increases.

In adopting streamlined procedures for LEC tariffs under section 204(a)(3), MFS urges the Commission to develop new streamlined tariff procedures that are specifically tailored in recognition of incumbent LECs' (ILECs) continued exercise of market power. MFS submits that there is good

⁷47 C.F.R. § 61.22(d).

cause to differentiate the streamlined tariff procedures developed by the Commission for nondominant carriers from the streamlined tariff procedures mandated by the 1996 Act.

The Commission developed its streamlined procedures for non-dominant carriers over more than two decades. Beginning with the *Competitive Carrier* proceeding in 1979,⁸ the Commission carefully examined its regulations and the state of competition in the marketplace before reducing or eliminating economic regulation of new competitive entrants. In 1990, six years after the Modified Final Judgement broke up AT&T,⁹ the Commission commenced the *Interexchange Competition* proceeding¹⁰ to examine the state of competition in the interstate long-distance market. The Commission streamlined regulation of AT&T's tariff filings service by service and only after a comprehensive review of the state of competition in the market.¹¹ Finally, on October 23, 1995,

⁸*Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC.2d 308 (1979) ("*Competitive Carrier* proceeding").

⁹*See United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982) (Modification of Final Judgement), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. AT&T*, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983).

¹⁰*Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Notice of Proposed Rulemaking, 5 FCC Rcd. 2627 (1990).

¹¹The Commission found that business services and 800 services had become "substantially competitive" and streamlined its regulation of AT&T's business and 800 services in 1991 and 1993. *Id.*, Report and Order, 6 FCC Rcd. 5880, 5887 (1991); *Id.*, Second Report and Order, 8 FCC Rcd. 3668, 3671 (1993). The Commission streamlined the regulation of AT&T's commercial services for small business customers in 1995. *Revisions to Price Cap Rules for AT&T Corp.*, CC Docket No. 93-197, Report and Order, 10 FCC Rcd. 3009, 3014 (1995).

sixteen years after commencing its *Competitive Carrier* proceeding, the Commission classified AT&T as a nondominant carrier in the domestic interexchange market.¹²

MFS recognizes that the Commission is limited by the Congressional mandate which requires the changes made by section 402(b)(1) of the 1996 Act to apply with respect to any charge, classification, regulation, or practice filed on or after one year after the date of enactment, or February 8, 1997.¹³ However, MFS emphasizes that Congress did not find that competition exists in the local exchange market, nor did Congress disturb the Commission's classification of ILECs as dominant carriers. Therefore, in designing streamlined procedures under section 204(a)(3), the Commission should consider what impact streamlining dominant carrier tariffs will have on the development of competition in the local marketplace and narrowly construe the Congressional mandate in section 204(a)(3) accordingly.

II. THE COMMISSION SHOULD PRESUME SECTION 204(a)(3) 7/15 DAY FILINGS LAWFUL WITHOUT LIMITING CUSTOMER REMEDIES (NPRM Part III, para. 7-15).

The Commission offers two interpretations of the phrase "deemed lawful." Under the first interpretation, a decision not to suspend and investigate a 7/15 day tariff filing would deem the rate

¹²*In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, CC Docket No. 79-252, Order, 11 FCC Rcd. 3271 (1995).

¹³1996 Act, § 402(b)(4).

included in the filing the “lawful” rate.¹⁴ Under the second interpretation, “deemed lawful” would establish higher burdens for suspensions and investigation by “presuming” LEC tariffs “lawful.”

The Notice asks for comment on whether Congress intended the phrase “deemed lawful” to limit customers’ remedies.¹⁵ MFS emphatically responds NO and urges the Commission to consider the perverse incentives its first interpretation would provide to the well-established ILECs. The Notice points out that under the first interpretation of deemed lawful, the Commission would be precluded from awarding damages for the period that a streamlined tariff is in effect prior to a determination that the tariff is unlawful.¹⁶ Thus, if the Commission did not suspend and investigate a 7/15 day tariff filing before its effective date, but later found in a section 208 complaint or section 205 investigation that the tariff was unlawful, the LEC could presumably receive up to five months¹⁷ worth of charges or competitive advantages to which it was not entitled under the law, a result that is clearly opposed to the Congressional intent of “opening all telecommunications markets to competition.”¹⁸

¹⁴Notice at para. 8.

¹⁵Notice at para. 11.

¹⁶Notice at para. 9.

¹⁷This assumes, of course, that a complaint or investigation is initiated immediately and that the Commission uses the entire statutory time period of five months to make a determination of unlawfulness.

¹⁸S. Rep. No. 104-23, at 2 (1995).

If a tariff filing deadline is missed, an interested party's sole option to contest an unlawful tariff will be to file a formal complaint under section 208. For small competitive local exchange carriers that may be harmed by a LEC's tariff, prosecuting costly section 208 proceedings may not be a realistic option. ILECs, on the other hand, have many resources to contest section 208 complaints. When taken together, the prospect of receiving up to five "free months" of unlawful charges or unlawful competitive advantages and the relatively minor burden of defending a section 208 complaint may actually provide incentives for the ILECs to file unlawful tariffs under the 7/15 day notice period.

Adopting the second interpretation of "deemed lawful," which involves a presumption rather than an automatic default that eliminates consumers' rights, does not pose any danger of creating such perverse economic incentives and is consistent with Congress' goal of streamlining the tariff process. The Commission's rules should presume section 204(a)(3) 7/15 day filings lawful and assign the burden of proof to those wishing to challenge the lawfulness of the filing. In order to overcome the presumption of lawfulness, challengers should be required to show that it is more likely than not that the tariff would be found unlawful after a Commission investigation. This burden of persuasion meets the goal of speeding up Commission action on LEC section 204(a)(3) tariffs without sacrificing customers' remedies and, at the same time, provides a measured level of enforcement.

III. STREAMLINED ADMINISTRATION OF LEC TARIFFS

A. Electronic Filing Should Be Implemented for All Tariffs and All Carriers (NPRM Part V, para. 21)

MFS urges the Commission to implement electronic filing of all tariffs regardless of the outcome of the instant rulemaking. Requiring electronic filing would eliminate the costs currently associated with massive tariff filings which are expensive to draft, file, review and maintain, both for carriers and Commission staff. The submission of tariff filings via electronic methods would aid considerably in the Commission's effort to reduce the administrative burdens caused by existing tariff filing procedures and would reduce the adverse ecological impact of producing, filing and distributing literally tens of thousands of paper documents nationally.

Tariffs should be posted either on an electronic bulletin board or an Internet site, readily accessible to consumers and all other parties potentially affected by the change **on the same day the tariff is filed**. The Commission could specify a uniform disclosure model to facilitate easy access and uniformity, but management of the electronic filing system should be outsourced to an independent third party "tariff administrator." The tariff administrator would be responsible for receiving, logging, copying and maintaining all electronic filings. The system might function in a manner similar to the North American Numbering Administration, where a third party would contract for the right to collect and publish electronically all tariff filings.

The Commission could eliminate massive amounts of paperwork by requiring all tariffs to be submitted electronically only. Electronic filing would, at least in the long run, reduce the costs

of filing and maintaining the tariff system and increase the availability and accessibility of carriers' tariffs and supporting materials.

B. Timely Notice of Streamlined Tariff Filings to the Public and Interested Parties is in the Public Interest (NPRM Part V, para. 26 and 28)

Publicly accessible tariffs are essential for the enforcement of a carrier's statutory obligations. Since section 204(a)(3) 7/15 day filings radically truncate the pre-effective review period, timely notice to the public and interested parties is paramount. MFS strongly urges the Commission to adopt not only its proposed e-mail notice to interested parties,¹⁹ but also (1) a requirement that ILECs make publicly available a schedule of planned section 204(a)(3) 7/15 day filings at least thirty days prior to the date of filing and (2) a requirement that section 204(a)(3) tariff filings be publicly available on the same day they are filed.

ILECs should be required to submit a list of planned section 204(a)(3) 7/15 day filings to the independent tariff administrator for publication on the Commission's electronic tariff system. Failure to post any filing involving a rate increase or rate decrease at least thirty days in advance should result in the ILEC having to file the tariff under the traditional notice periods, not the shortened 7/15 day period. Since the majority of, if not all, filings require internal planing and preparation well in advance of their actual filing, a posting requirement would place no undue burden on the ILECs and would help ensure that all parties potentially affected by such tariff changes are aware of the impending filing. This would dramatically reduce the potential for

¹⁹Notice at para. 26.

numerous section 208 proceedings which would otherwise burden both the Commission and the ILEC.

The Commission has proposed an extremely short time period of three days after the date of tariff filing for petitions against section 204(a)(3) 7/15 day tariff filings.²⁰ While MFS recognizes that these deadlines are necessary for the Commission to make a suspension or investigation determination, it will be next to impossible for petitioners to meet these deadlines without timely notice of section 204(a)(3) filings and **immediate access to the tariffs and supporting materials on the same day they are filed**. Providing advance notice of section 204(a)(3) filings will enable both the Commission and the public to schedule and devote resources to reviewing 7/15 day filings beginning the date they are filed. The Commission should also consider establishing a filing deadline that is earlier than its traditional 5:30 p.m. EST deadline to ensure that interested parties and the Commission may begin their review of a section 204(a)(3) tariff filing on the same day it is filed.

C. The Commission Should Strictly Apply the Rules it Adopts for Section 204(a)(3) Filings and Reject any Filing that Does Not Comply with Its Rules (NPRM Part V, para. 25)

Part 61 of the Commission's Rules addresses tariff filing requirements. Section 61.1(b) provides that:

²⁰Notice at para. 28.

Tariff publications filed with the Commission must conform to the rules in this part. Failure to comply with any provision of this part may be grounds for rejection of the non-complying publication.²¹

The Commission previously adopted a similar yet broader facial compliance policy when it allowed AT&T to file its business service tariffs on fourteen days notice.²² Given that both the Commission and the public have a very limited time to review section 204(a)(3) filings that are made on 7 or 15 days notice, it is imperative that the Commission reject any filing that does not facially comply with the statute or a Commission regulation or order.

D. The Commission Should Not Abandon Pre-Effective Review of Section 204(a)(3) Streamlined Tariff Filings (NPRM Part V, para. 23)

MFS urges the Commission to continue to rely primarily on pre-effective review of LEC tariffs to ensure their compliance with Title II of the Communications Act. Nothing in section 402(b)(1)(A) directs the Commission to abandon its policy of relying on pre-effective review of LEC tariff filings. While MFS understands that the shortened 7/15 day notice periods may place a strain on Commission resources, the Commission can reduce the burdens of maintaining its pre-effective review policy by (1) following the 1996 Act's express terms and limiting 7/15 day filings to rate decreases and increases; (2) requiring ILECs to provide advance notice of planned 7/15 day filings; and (3) adopting electronic filing procedures that will facilitate timely access and review of the tariffs and all accompanying materials.

²¹47 C.F.R. § 61.1(b).


²²"We will reject any tariffs that we find on their face conflict with a statute or an agency regulation or order." *In the Matter of Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, First Report and Order, 6 FCC Rec. 5880, 5894 (rel. Sept. 16, 1991).

IV. CONCLUSION

In summary, MFS respectfully requests that the Commission adopt rules that balance the need for the public and interested parties to have a meaningful opportunity to challenge a LEC's tariffs with the Congressional directive to streamline specific LEC tariff filings. MFS recommends that the Commission achieve this balance by: (1) narrowly interpreting the types of LEC tariff filings that are eligible for 7 or 15 day notice periods; (2) preserving customers' rights to remedies if such filings are later found unlawful; (3) instituting an electronic filing system that will reduce burdens on the carriers, their customers, interested parties and the Commission; and (4) requiring both advance and timely notice of planned section 204(a)(3) filings.

Respectfully submitted,

David N. Porter
Vice President, Government Affairs
MFS COMMUNICATIONS COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709


Andrew D. Lipman
Tamar E. Haverty
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for MFS COMMUNICATIONS
COMPANY, INC.

Dated: October 9, 1996

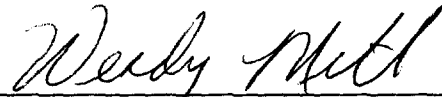
CERTIFICATE OF SERVICE

I, Wendy D. Mills do hereby certify that on this 9th day of October, 1996, the foregoing
Comments of MFS Communications Company, Inc., CC Docket No. 96-187 were served Via
Messenger to the following:

William Caton (orig. +16)
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

Jerry McCoy (1 copy + diskette)
Common Carrier Bureau
Federal Communications Commission
Room 518
1919 M Street, NW
Washington, DC 20554

ITS (1 copy)
2100 M Street, NW
Suite 140
Washington, DC 20037



Wendy Mills